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Chairman: Mr. Politi ..... (Italy)

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The meeting was called to order at 10.15 a.m.

Agenda item 159: Report of the International Law Commission on the work of its fifty-second session (*continued*) (A/55/10)

1. **Mr. Valdivieso** (Colombia), speaking on behalf of the Rio Group and referring to the topic of State responsibility, said that it was necessary to think carefully about the final form to be given to the draft articles. The Rio Group, while mindful of the existing difficulties, would prefer the adoption of a convention as a legal framework that would contribute to resolving disputes which might arise from non-compliance by States with their international obligations.

2. The Rio Group supported the inclusion of draft article 45, relating to the exhaustion of available and effective local remedies before State responsibility was invoked.

3. With regard to Part Two, chapter II, of the draft articles, the Rio Group welcomed the incorporation of the principle of full reparation, which was well established in international law and jurisprudence. With regard to compensation, the Rio Group would favour the inclusion of a method for determining the amount of compensation. As to satisfaction, the Rio Group recognized its symbolic role in facilitating the settlement of disputes, since in many international conflicts non-material damage could acquire great significance.

4. The Rio Group delegations had reservations concerning the provisions on countermeasures. If included in the draft articles, they must be strictly regulated to prevent abuses. Countermeasures should be limited to the suspension of international obligations vis-à-vis the responsible State. They could not involve the use of force or affect established human rights obligations, those of a humanitarian character or those emanating from peremptory norms of general international law. Countermeasures should be proportional, with proportionality being understood as the minimal degree of the measures necessary to induce compliance. The notion of collective countermeasures raised serious difficulties and should be reviewed carefully by the Special Rapporteur.

5. Turning to the topic of diplomatic protection, he said that such protection was a right of the State, exercised at its discretion. The Rio Group rejected the use of force as a means of exercising diplomatic protection. Resort to the threat or use of force was prohibited by Article 2, paragraph 4, of the Charter of the United Nations. The draft articles should clearly prohibit the threat or use of force as a means of exercising diplomatic protection.

6. With regard to the topic of unilateral acts of States, he said that the varied nature of such acts made it difficult to elaborate common rules. Nevertheless, such rules could be established with regard to the definition of unilateral acts, the capacity of States to formulate them, persons authorized to formulate such acts and the causes of invalidity of unilateral acts. Other aspects, such as the legal effects, application, interpretation, duration, suspension, modification and withdrawal of unilateral acts, should be the subject of specific norms.

7. On the topic of reservations to treaties, he said that the treatment given to the topic was linked to a basic component of international law, namely, the law of treaties. The Rio Group supported the approach taken by the Special Rapporteur, which was to fill gaps and clarify ambiguities in the Vienna regime on the law of treaties without impairing its integrity. The Rio Group also supported the Commission's decision to prepare a Guide to Practice, including, where necessary, "model clauses" intended to assist States in concluding agreements or treaties.

8. With regard to the topic of international liability for injurious consequences arising out of acts not prohibited by international law, he said that, in view of the need to integrate the prevention and liability aspects of the topic, the Commission should give priority to defining rules on liability.

9. With regard to the suggestion made by some members of the Commission that the distinction between lawful and unlawful activities should be eliminated, the Rio Group believed that the reference in draft article 1 to "activities not prohibited by international law" should be retained, since the draft articles dealt with international liability in the context of risk management.

10. As to the long-term programme of work of the Commission, the Rio Group wished to see the following topics included: responsibility of international organizations, the risk of the fragmentation of international law and the position of the individual in international law. The Rio Group also

supported the holding of one or two of the Commission's sessions in New York.

11. Lastly, the Rio Group delegations expressed concern at the growing tendency to promote the development of "soft law". The Rio Group understood that soft law constituted a transitional step between customary law and treaties and that it made codification possible in many instances. Nevertheless, soft law should not be used as a means of avoiding the adoption of instruments of a binding character. The adoption of declarations or guidelines that were not concretized later in the form of agreements binding on States constituted an unfavourable trend in the codification and progressive development of international law.

12. **Mr. Sepulveda** (Mexico), referring to chapter VIII of the report, said that the set of draft articles was complete and balanced. It gave concrete form to important obligations, such as the duty of States to exercise control over activities conducted in their territory and the duty not to cause damage in the territory of other States. At the same time, certain provisions should be clarified and strengthened, such as those relating to the scope of application and the definition of significant harm. More space should be devoted to the precautionary principle.

13. His delegation attached particular importance to draft article 6 on the authorization of activities carried out in the territory or under the jurisdiction or control of a State; draft article 10, which provided that the State of origin had an obligation to take appropriate and feasible measures to minimize risk; article 11, which listed the factors involved in an equitable balance of interests; and draft article 15, which allowed persons who might be affected by hazardous activities to have access to the judicial procedures of the State concerned without discrimination on the basis of nationality or residence or place where the injury might occur.

14. His delegation was not in favour of modifying the title of the draft articles until a final text had been prepared which analysed both aspects of the topic, namely, prevention and international liability. The report made no mention of the follow-up of the broader issue of international liability, which was what had given rise to the consideration of the issue of prevention in the first place. As noted by the Commission in paragraph 167 of the report on its forty-ninth session (A/52/10), international liability had been the core issue of the topic as originally conceived. Prevention could not be separated from liability; the draft articles on prevention must contain a special regime of liability for damage, whether or not a violation of preventive obligations had occurred. Furthermore, the Sixth Committee had supported the decision to divide the study of the topic on the understanding that once the analysis of prevention had been completed, the study of liability would begin; that understanding had been reiterated in General Assembly resolution 54/111.

15. Turning to the topic of reservations to treaties, he said that the Commission's objective was to assist States to fill gaps and clarify ambiguities in the regime established by the Vienna Conventions of 1969, 1978 and 1986, without modifying that regime or impairing its unity and integrity.

16. The subject of late reservations deserved further consideration. The Vienna Conventions provided that a reservation to a treaty could not be formulated once the State in question had expressed its consent to be bound by the treaty. Draft guideline 2.3.1 took the Vienna regime as its starting-point, but also provided for an exception to those rules based on the consent of the contracting parties. That guideline would open the door to the admissibility of late reservations.

17. While the Special Rapporteur rightly attached value to the consent of the parties to a treaty, his delegation doubted whether that would be sufficient to justify an exception as open-ended as the one contained in draft guideline 2.3.1. In particular, his delegation was concerned at the fact that the draft guideline did not establish any further limitations; that could allow States to modify the scope of international obligations which they had already accepted.

18. His delegation noted with interest the proposal to include in the Guide to Practice provisions on alternatives to reservations and interpretative declarations, which would be of great value to users.

19. With regard to the long-term programme of work of the Commission, his delegation was not convinced of the usefulness of all the topics listed in paragraph 729 of the report, at least in the form in which they were proposed. In particular, it was concerned at the fact that some topics were discussed in isolation, rather than in a more general context, such as the topic of expulsion of aliens, which should not be considered

outside the context of the position of the individual in international law. Furthermore, the inclusion of new topics should not affect the consideration of topics currently on the Commission's agenda.

20. Lastly, his delegation noted with satisfaction the proposal in paragraph 734 of the report to hold one or two of the Commission's sessions in New York; that would help to strengthen ties between the Sixth Committee and the Commission.

21. **Mr. El-Baharna** (Bahrain), speaking on reservations to treaties, noted that according to the commentary to draft guideline 1.1.8, it was a matter of controversy whether statements made in application of exclusionary clauses constituted reservations. That view was based essentially on the practice of the International Labour Organization (ILO), which did not accept for registration instruments of ratification of international labour conventions which were accompanied by reservations. Member States of ILO had to choose between ratifying such conventions without reservations, and not ratifying them at all. However, those conventions did not differ in kind from other treaties containing an express provision excluding reservations. Indeed, some treaties expressly authorized specified types of reservation. Moreover, according to paragraph (9) of the commentary it seemed that a unilateral statement made under an exclusionary clause of that kind could be classified as a reservation, despite the fact that a State party could not object to such a statement, as it could to a reservation. A reservation made under an exclusionary clause was therefore similar to a reservation clause in a treaty. Once a reservation was expressly provided for in a treaty, the contracting States knew what to expect, having accepted in advance, in the treaty, the reservation or reservations concerned. According to paragraph (19) of the commentary, draft guideline 1.1.8, like draft guideline 1.1.2, was based on the expression of consent to be bound by a treaty. His delegation therefore supported the former draft guideline.

22. He was also inclined to endorse draft guideline 1.4.6, on unilateral statements made under an optional clause. The optional clauses in question were those which expressly authorized the parties to accept an obligation not otherwise imposed by the treaty. A unilateral statement under such an optional clause was outside the scope of the draft Guide to Practice. Moreover, a restriction or condition contained in such a statement did not constitute a reservation within the meaning of the draft Guide. Paragraph (2) of the commentary explained that such statements had the effect of increasing the declarant's obligations beyond what was normally expected of the parties under the treaty, and did not affect its entry into force in their case. A statement made under draft guideline 1.4.6 seemed to have the same effect as under guideline 1.4.1, adopted by the Commission in 1999. However, paragraph (7) of the commentary explained that under guideline 1.4.1, the statement was formulated on the sole initiative of the author, whereas a statement under draft guideline 1.4.6 would be made under a treaty. In the light of the commentary, the key difference between the two types of statement was that one made under an exclusionary clause, according to draft guideline 1.4.6, constituted a reservation, while according to guideline 1.4.1 a statement containing a restriction or condition under an optional clause did not. However, because of the potential for confusion between the two types of statement, he thought it would be useful to include a guideline in the draft Guide to Practice in order to distinguish between them.

23. Draft guideline 1.4.7, on unilateral statements providing for a choice between the provisions of a treaty, referred to the kind of clause in a treaty which expressly required the parties to choose between two or more of its provisions. Such clauses were covered in article 17, paragraph 2, of the 1969 and 1986 Vienna Conventions. In that case, a State's consent to be bound by the treaty became effective only when it was made clear to which of the provisions the consent related. The provisions of the draft guideline evidently lay outside the scope of reservations, and his delegation was therefore inclined to support it.

24. With regard to draft guideline 1.7, on alternatives to reservations, he agreed with the view expressed in paragraph (2) of the commentary that such alternatives differed profoundly from reservations in that they constituted not unilateral statements, but clauses in the treaty itself, and accordingly related more to the process of drafting a treaty than to its application. They therefore lay outside the scope of the draft Guide to Practice. The Commission, however, felt that they deserved to be mentioned in the chapter of the draft Guide devoted to the definition of reservations, if only so as to identify more clearly the key elements of the concept. According to paragraph (3) of the commentary, the same problem arose, *mutatis*

mutandis, with regard to interpretative declarations whose objective could be achieved by other means. Draft guideline 1.7.2 stated that alternatives to interpretative declarations were the inclusion in the treaty of provisions in purporting to interpret it, or the conclusion of a supplementary agreement to the same end. He doubted whether it was necessary to go to such lengths in providing for alternative procedures, since the Guide to Practice was intended to deal only with the definition of reservations. His delegation did not believe it would be useful or helpful to expand the topic to include clauses or guidelines on issues related to alternatives to reservations. Such treaty clauses might or might not be regarded as reservations by the States making them. Alternatives to reservations should therefore be regarded as outside the confines of the topic.

25. **Mr. Verweij** (Netherlands) said that his country had been following with great interest, and with some concern developments concerning the topic of international liability for injurious consequences arising out of acts not prohibited by international law. He noted that the only countries, apart from the Netherlands, which had submitted comments and observations on the draft articles by 12 April 2000 were France, Lebanon, Turkey and the United Kingdom. He urged other States to submit their comments, in order to enable the Commission to complete its work on the prevention of transboundary damage from hazardous activities and proceed with work on the draft articles on liability, an essential element of the topic which had been deferred pending adoption of the draft articles on prevention.

26. He noted with satisfaction that the latter draft articles had been changed to reflect the concern expressed about their scope, and especially the definition of "risk of causing significant transboundary harm". The new wording made it clear that a range of activities was covered by the definition. He welcomed the redrafting of paragraph 2 of the former draft article 10, now draft article 9. According to his Government's understanding, that paragraph implied that an environmental impact assessment must be carried out before the State of origin authorized the activity in question, and that information must be given to the public before it was authorized. He welcomed the inclusion of the new draft articles 16 and 17, on emergency preparedness and notification of an emergency, which had proved to be indispensable in ensuring a timely and adequate response to harm caused by hazardous activities.

27. His country regretted, however, that most of its comments and observations, reflected in the report of the Secretary-General (A/CN.4./509) had not been followed. The report of the Commission and the third report of the Special Rapporteur (A/CN.4/510) did not explain why. He drew attention to the comments about the drafting of provisions on environmental impact assessment. Although the draft articles were intended to apply worldwide, and regional conventions might not be entirely suitable for that purpose, more use could have been made of conventions developed in the region of the Economic Commission for Europe, such as the *1991 Convention on Environmental Impact Assessment in a Transboundary Context*. The provision for public participation could usefully have been drawn from the Aarhus Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters.

28. Lastly, he noted that the treatment of dispute settlement remained meagre. Existing multilateral environmental agreements provided a sound basis for the development of a stronger, effective dispute settlement procedure, and especially for drafting provisions on fact-finding and conciliation. He therefore urged the Commission to pursue its work on the draft articles in the light of the comments and observations submitted by Governments.

29. **Mr. Geete** (India), speaking on the topic of reservations to treaties, said he endorsed the principles embodied in draft guidelines 1.1.8 and 1.4.6. A statement by a State Party that modified the terms of operation of an optional clause might be regarded as a reservation to the legal regime incorporated therein and should therefore fall within the scope of the draft guidelines. However, a unilateral statement embodying a choice between two or more provisions of a treaty in accordance with a provision of that instrument which expressly authorized such a choice did not constitute a reservation; draft guideline 1.4.7 was therefore acceptable.

30. He welcomed draft guideline 1.7.1 and agreed that supplementary agreements between States parties that modified or restricted the provisions of the original treaty should be treated not as reservations but as independent agreements.

31. With respect to draft guideline 1.7.2, he noted that while the insertion in a treaty of provisions purporting to interpret it was the more common practice, the conclusion of a supplementary agreement to the same end was expressly envisaged in article 31, paragraph 3 (a), of the 1969 Vienna Convention on the Law of Treaties and the 1986 Convention on the Law of Treaties between States and International Organizations or between International Organizations.

32. He was pleased that the Commission's work on the issue of international liability for injurious consequences arising out of acts not prohibited by international law was proceeding on schedule and stressed the need to consider the topic in the context of development issues; funding and transfer of resources to less-developed countries, including enhanced access to suitable technology at a fair price, was essential to the success of standard-building and implementation efforts. While welcoming the inclusion of a preamble mentioning the right to development, he would have preferred one or more articles on the linkage between capacity-building and effective implementation of the duty of due diligence to be included in the draft.

33. He did not think that mention in draft article 11 of the factors involved in an equitable balance of interests would dilute the obligation of prevention established in draft article 3. That issue had already been raised in draft article 10, paragraph 2; moreover, States' efforts to ensure that the measures undertaken by the State of origin were mutually satisfactory and proportional to the requirement of safe management of the risk involved were dealt with in draft articles 9, 10, 11 and 12.

34. While he agreed that deletion of the words "activities not prohibited by international law" in draft article 1 would not materially affect the regime of prevention, which was oriented towards risk management rather than questions of liability and responsibility, he would prefer to retain it and, if necessary, to add a suitable explanation. Furthermore, he was opposed to removing the topic of liability from the Commission's agenda.

35. Although the regime of prevention incorporated the duty of due diligence, he did not think that specific mention of that duty should be included in article 3. The articles should be adopted as a framework convention, and the elaboration of a dispute settlement mechanism should therefore be left to the States concerned.

36. **Mr. Leanza** (Italy), speaking on the topic of reservations to treaties, said that the 12-month time limit for objections to late reservations, recently adopted by the Secretary-General in his capacity as depositary, was preferable to the former 90-day limit. In any case, tacit agreement on late reservations would constitute a new agreement since the time limits for formulation of reservations could not be altered without compromising the principle of *pacta sunt servanda*.

37. Draft guidelines 1.1.8 and 1.4.6 dealt with opting-out clauses inserted in a treaty at the negotiation stage, which were virtually indistinguishable, except in name, from the saving clauses that had long been accepted in international law. They had been included in the draft primarily in order to resolve doubts that could be raised by the practice of certain international organizations such as ILO, whose interpretation of reservations was far more restrictive than that of the 1969 Vienna Convention.

38. The purpose of the restrictive interpretation adopted by those international organizations was to justify the inclusion of statements that limited obligations explicitly authorized under a treaty. However, the same result could be achieved by recognizing that the international legal system had progressed to a point where it could no longer accept the inclusion of reservations other than those explicitly provided for in the treaty. The draft Guide to Practice should therefore include a coherent treatment of exclusionary clauses.

39. Unilateral statements made under an optional clause (draft guideline 1.4.6) differed from those covered by draft guideline 1.4.1 in that they involved a choice based on a treaty provision rather than on the sole initiative of a State. They did not constitute reservations because their intent was not to restrict, but rather to expand, the obligations assumed under the treaty. However, the stipulation that a restriction or condition contained in such a statement did not constitute a reservation within the meaning of the draft Guide, while logically correct, raised several general questions regarding the admissibility of reservations. For example, it might be concluded that the restrictions contained in unilateral statements made under optional clauses were admissible only where they were not

inconsistent with the purpose of the provision in question.

40. The other two guidelines adopted by the Commission at its fifty-second session (guidelines 1.7.1 and 1.7.2) related to alternatives to reservations and interpretative declarations that would still allow States with particular problems or situations to become parties to a treaty. Those guidelines enhanced the understanding of what constituted reservations by clarifying their limits and at the same time encouraged less drastic solutions.

41. Although the new draft guidelines presented by the Commission were helpful for international practice, they represented only a part of a regime that would have to be much more extensive, the next step being consideration of the procedural matters raised in the second part of the Special Rapporteur's fifth report (A/CN.4/508/Add. 3 and 4).

42. Of the five topics presented by the Planning Group for inclusion in the long-term programme of work of the Commission, his Government placed the highest priority on the topics of responsibility of international organizations and the effects of armed conflict on treaties. For the first of those topics, the starting principle should be that, in addition to the general rules in force in the field of State responsibility, the international law of responsibility as it applied to international organizations should include other special rules required by the particular features of the subject. To be sure, the scarcity of international practice on the matter would make the work of the Commission more difficult. However, the syllabus developed by Mr. Pellet was thorough and well thought out. Of particular interest were the ideas put forward on combination of responsibilities, a sensitive topic due to the special nature of international organizations and countermeasures.

43. The question of the effect of armed conflict on treaties was an ideal topic for codification and progressive development of international law, since recent State practice was abundant, yet many interpretative uncertainties remained. The appearance of new types of international conflict and military occupation required special legal consideration. The schema relating to the topic outlined by Mr. Brownlie was very interesting, although point 2, "The definition of a treaty for present purposes," raised some questions. Surely there was no need to arrive at a definition of a treaty other than that contained in the 1969 Vienna Convention. The elaboration of new instruments of codification and development should not result in a multiplication of concepts and create legal uncertainties.

44. His delegation felt that before taking up the proposed topic of shared natural resources of States, it would be better to complete the work on international liability for injurious consequences arising out of acts not prohibited by international law. With regard to the proposed topic of expulsion of aliens, since the matter was part of the domain reserved for the State with only a few restrictions in general international law in the area of human rights protection, notably with regard to refugees and their right to asylum, the subject did not seem a suitable one for codification as international law.

45. Lastly, the proposed topic of the risks ensuing from fragmentation of international law, although a timely one, seemed to require a choice of modalities and techniques of codification, rather than the elaboration of a specific legal regime. If the aim was to help States achieve a fuller understanding of the problem in order to avoid excessive compartmentalization with the resulting risk of incompatibility between legal regimes, it might be better to organize a seminar on the theme.

46. **Mr. Szenasi** (Hungary), commenting on the draft articles on international liability for injurious consequences, welcomed the proposal to delete, the words "acts not prohibited by international law" from the title of the draft articles. He endorsed the reasoning of the Special Rapporteur on that point. He also supported the additions to draft article 6, clarifying the obligations of the State of origin concerning prior authorization. The principle of retroactivity covering pre-existing hazardous activities, laid down in paragraph 2 of that article, was necessary in order to create an all-embracing regime. He supported the more stringent procedural rules currently proposed in draft articles 9 and 10 on the requirements for notification, information and consultation. The obligation placed on the State of origin to introduce appropriate interim measures for a reasonable time created the necessary link between the lifespan of such measures and the period of time needed to resolve the dispute at hand. He strongly supported the new draft articles 16 and 17 on the preparation of contingency plans for

emergencies, and the duty to give notice of an emergency.

47. As for the future form of the draft articles, he agreed with the Special Rapporteur and with the Commission that a framework convention would be appropriate. Such a convention should be without prejudice to higher standards laid down in other related bilateral or regional treaties. It might indeed encourage more detailed specific agreements. In June 2000, Hungary had launched a regional environmental initiative to strengthen regional cooperation in environmental protection in Central and Eastern Europe, based on the various factors in the region which exposed it to events resulting in transboundary harm. The initiative called for enhanced international cooperation in environmental protection and for the strengthening of existing organizational structures for prevention and risk assessment and for the prediction, notification and monitoring of transboundary environmental damage. It placed emphasis on tightening up dispute settlement mechanisms, to ensure that no disputes remained unsolved. The timely adoption of a framework convention would give further momentum to the initiative.

48. On the question of future work on the topic, he recalled that both the Stockholm Declaration and the Rio Declaration encouraged States to pursue the further development of international law on liability and compensation for environmental damage caused by activities within their jurisdiction. The same principle should guide the Commission's future work on the topic, in view of the inherent interrelationship between hazardous activities, the duty of prevention and the question of liability. The latter question, and the need to clarify its relationship with State responsibility, had already been mentioned within the Commission. In order to develop effective rules on prevention, there must be a detailed set of rules on liability and the conditions for invoking it. The Commission was making excellent progress towards completion of the draft articles on prevention, at which time it would be able to proceed with the question of international liability.

49. **Mr. Czapliński** (Poland) said that he endorsed the Commission's decision to produce a Guide to Practice on reservations to treaties that would supplement and clarify the Vienna Conventions rather than amend them.

50. The Commission was of the opinion that the definition of reservations in draft guideline 1.1 and, in particular, the term "certain provisions", should be interpreted in the light of subsequent practice in the implementation of the 1969 Vienna Convention. It was clear from that practice that statements concerning certain provisions of a treaty or the treaty as a whole with respect to specific aspects in their application were recognized as reservations. There was, however, an obvious disharmony between the wording used in draft guideline 1.1 on the one hand and draft guidelines 1.1.1, 1.1.3 and 1.3.3 on the other. That discrepancy should be eliminated.

51. He proposed minor drafting changes to draft guideline 1.1.1, the wording of which expanded the literal meaning of the definition of reservations under all three Vienna Conventions and even that of draft guideline 1.1; however, that expansion was in keeping with State practice in implementation of those Conventions. It appeared from the draft guidelines and the commentary that the Commission was oblivious of the problem of reservations to the treaty as a whole — for example, reservations by which a State claimed the right to denounce a treaty despite the absence of a denunciation clause in the instrument itself. That problem should be addressed.

52. The title of draft guideline 1.1.2 ("Instances in which reservations may be formulated") misleadingly suggested that an exhaustive list would follow, particularly as the Commission distinguished between the terms "reservations formulated" and "reservations made". However, the use of the word "include" in the body of the draft guideline appeared to imply that the instances referred to therein were not exclusive. If the intent was to refer only to all instances of final expression of consent to be bound, there was no need for the reference to signature, which preceded ratification or confirmation, but notification of succession should be mentioned. He therefore proposed that the words "and notification of succession under article 20 of the 1978 Vienna Convention on Succession of States in respect of Treaties" should be added at the end of draft guideline 1.1.2.

53. The title of draft guideline 1.1.3 ("Reservations having territorial scope") was misleading; it was not reservations, but treaties, which had such scope. The content of the provision would be better reflected by the title "Reservations relating to the territorial application of the treaty".

54. Draft guideline 1.4.1 seemed to allow for the possibility that a reservation could be made at a time other than those envisaged in draft guideline 1.1. The provision had the laudable goal of allowing the expansion of a treaty's territorial application; however, a reservation of the type envisaged would fall outside the definition of reservations given in the Vienna Conventions and even in the draft Guide itself, since the temporal element of unilateral statements was an essential aspect of reservations, as confirmed by the Commission in paragraph (11) of its commentary to draft guideline 1.1.5, (A/54/10). The issue required further consideration.

55. Draft guideline 1.1.8 should be amended to cover only exclusionary clauses limited to specific single provisions of a treaty.

56. He was not certain that conditional interpretative declarations should fall outside the definition of reservations, and he found the explanation provided in paragraph (11) of the commentary to draft guideline 1.2.1 (A/54/10) puzzling rather than enlightening. The danger was that States would be unable to oppose such declarations through a well-established mechanism of objection, a situation which might open the door to their imposition on other States.

57. He was generally in favour of the Special Rapporteur's approach to the formulation, modification and withdrawal of reservations and interpretative declarations. However, the draft Guide appeared to assume that late reservations required a collateral agreement, whereas his delegation believed that they should be deemed legitimate in the absence of any objection by the other contracting parties consulted by the depositary; a single objection would render the reservation invalid, and the requirement of unanimity would limit the risk of abuse.

58. Turning to the draft articles on unilateral acts of States, he stressed the difficulty of elaborating general guidelines applicable to all such acts. Formulation of specific criteria concerning particular kinds of unilateral acts would inevitably exceed the Commission's mandate; rather, the focus should be on providing an inclusive set of rules and on establishing the interrelationship, or even the parallels, between unilateral acts and treaties as regulated in the 1969 Vienna Convention. The draft articles should deal exclusively with non-dependent unilateral acts.

59. With respect to draft article 3, he considered that the binding force of declarations or notifications made on behalf of a State by persons other than Heads of State or Government and Ministers for Foreign Affairs should be established under the domestic legislation of the State concerned.

60. With regard to the draft articles on international liability for injurious consequences arising out of acts not prohibited by international law, his delegation endorsed the Commission's decision to defer consideration of the question of international liability as a means of facilitating work on the topic; however, limitation of the draft articles to obligations deriving from prevention would narrow the topic unnecessarily.

61. He realized that the Commission's work was complicated by the fact that the current status of international law governing preventative measures was unclear. While all States agreed that the environment must be protected and that potentially harmful activities must be regulated, environmental standards and national financial capacities varied and it would be difficult to establish a minimum standard of conduct.

62. He agreed with the proposal to delete the words "acts not prohibited by international law" since the negative consequences of illegal acts would be covered by the law on State responsibility; in any case, it was difficult to imagine a situation in which a State would notify another State of its intention to violate international law in order to negotiate with it regarding environmental impact or risk assessment.

63. He welcomed the inclusion of draft articles 9 and 10; although they did not reflect the current state of international customary law, they rightly introduced the duty to negotiate in order to minimize risks. In addition, the relationship between the draft articles and existing international legal instruments in the field of environmental protection should be clearly set out and the possibility of including a more detailed mechanism for dispute settlement should be considered.

64. **Mr. Rogachev** (Russian Federation), commenting on the topic of reservations to treaties, said he could accept the five draft guidelines adopted by the Commission on first reading at its fifty-second session. They had the merit of successfully combining the treatment of the legal character of reservations found in the 1969 and 1986 Vienna Conventions with a survey of practice in applying the relevant provisions of those conventions.

65. In his view, draft guideline 1.7, on alternatives to reservations and interpretative declarations, had less to do with reservations than with the planning of international treaties. It would, however, be useful as part of the Guide to Practice, which was intended to produce a clearer distinction between reservations and other means of altering the scope of treaty obligations. The Special Rapporteur had rightly chosen to separate such procedures into those forming part of the treaty itself, and those outside it. However, the question of the consequences of inadmissible reservations, those contrary to the object and purpose of the treaty, was not at present covered in the Guide. It would be useful for the Commission to make some recommendations to fill that gap.

66. In conclusion, he found the draft Guide to Practice an extremely useful document and hoped for more rapid progress on it in future.

67. **Mr. Aurescu** (Romania) said that diplomatic protection in contemporary international law represented a discretionary right of the State by virtue of which the State was entitled to protect its nationals when they suffered injury as a consequence of a violation of international law. Although clearly not a human right, diplomatic protection might also be viewed as a valuable procedural modality for ensuring the protection of human rights.

68. Accordingly, in the definition of diplomatic protection in draft article 1 the words "action taken by a State", which seemed to be controversial, should be replaced by the words "procedural remedy or modality undertaken in accordance with international law by a State". The same article should mention the aim or purpose of diplomatic protection. Although diplomatic protection was a sovereign prerogative of a State, exercised at the latter's discretion, its goal must be to ensure that the internationally wrongful act ceased and that the injury was repaired.

69. His delegation supported the views expressed in favour of deleting draft article 2, since the use of force should not be considered a means of diplomatic protection and was contrary to its very nature.

70. In view of recent developments in international human rights law and in the light of the purpose of diplomatic protection, his delegation believed that the innovative provisions of draft article 4 had merit and deserved further consideration.

71. With regard to draft article 5, the issue of effective link should be opposable only between two or more States of which an individual was a national. No other State should be entitled to invoke the effective link concept in order to reject the procedural endeavours of a State of nationality to protect its national, provided only that the nationality had been legally granted. Since a State's right to grant nationality was virtually absolute, the main clause of draft article 5 should read "the State of nationality means the State whose nationality the individual sought to be protected has acquired in accordance with its national laws".

72. In the related draft article 6, his delegation preferred the term "dominant nationality" rather than "effective nationality" in situations of dual nationality. The Commission might consider including a second paragraph allowing, exceptionally, a State of nationality to exercise diplomatic protection against a State of which the injured person possessed dominant nationality if that State violated the human rights or fundamental freedoms of that individual or failed to ensure appropriate protection in the case of such violation.

73. His delegation supported the concept of the joint exercise of diplomatic protection by two or more States of nationality as provided for in draft article 7. An appropriate formula should be found to avoid the difficulties that might arise if one of those States were to cease its efforts to exercise diplomatic protection or declare itself satisfied with the reaction of the respondent State, while the other State or States continued to act. A solution might be found with reference to the purpose of diplomatic protection.

74. Although sharing the concern that the extension of diplomatic protection to refugees as proposed in draft article 8 might impose an additional burden on the State of asylum and thus discourage States from granting refugee status, his delegation basically supported the extension of protection to stateless persons. However, there was a need for further clarification regarding the legal compatibility between refugee status and legal residence.

75. With regard to the work on unilateral acts of States, his delegation supported the suggestion of dividing the draft articles into a first part containing general rules applicable to all unilateral acts and a

second part containing specific rules applicable to individual categories of unilateral acts.

76. In the definition in draft article 1, his delegation would suggest that the possible addressees of a unilateral act should be not only States or international organizations but all subjects of international law. In draft article 3, paragraph 1, it would be better to say that heads of State, heads of Government and Ministers for Foreign Affairs were considered "authorized by the State" rather than considered "as representatives of the State" for the purpose of formulating unilateral acts on its behalf. In paragraph 2 of the draft article, it needed to be clarified which State practice was meant, that of the State formulating the act or that of the addressee.

77. With regard to the topic of reservations to treaties, his delegation welcomed the five new draft guidelines adopted on first reading, particularly guideline 1.7.1 on alternatives to reservations, which should prove highly useful in increasing the number of States willing to become parties to a given treaty. Among the proposed guidelines not yet discussed by the Commission, his delegation particularly welcomed draft guideline 2.2.4 on reservations formulated when signing for which the treaty made express provision, which promised to dispel the confusion evident in the practice of many States in that regard.

78. The proposed guidelines on late reservations followed existing practice. His delegation agreed that a late reservation could only be accepted if all other Parties to the treaty unanimously (and tacitly) accepted it and that a single objection should prevent the late reservation from producing its effects. His delegation noted with interest the extension by the Secretary-General, the most important depositary of multilateral treaties, of the 90-day period for objections to late reservations to a 12-month period.

79. His delegation looked forward to the Commission's further work on the question of permissibility of reservations and the consequences of inadmissible reservations.

80. **Mr. Yachi** (Japan), speaking on diplomatic protection, said that his delegation shared the view that draft article 2 should be deleted. The issue of the use of force should not be dealt with in the context of diplomatic protection. His delegation also did not consider it appropriate to incorporate human rights implications into the draft articles on diplomatic protection.

81. His delegation firmly believed that diplomatic protection was a right accorded not to an individual but to a State under international law. A State had full discretion to decide whether or not to claim the right of diplomatic protection on behalf of its nationals. It had no obligation to do so. Japan therefore supported the Commission's decision to delete draft article 4.

82. His delegation considered that draft article 5 should not deal with methods of acquisition of nationality, since nationality was an internal matter of a State. Regarding the related draft article 6 dealing with dual or multiple nationality, his delegation believed that the time was not ripe to codify a rule allowing a State to exercise the right of diplomatic protection against a State of which the injured person was also a national. Current international law did not substantiate the principle of dominant or effective nationality to such an extent.

83. His delegation, like others, could not accept the proposal in draft article 8 that diplomatic protection might be exercised by the State of habitual residence of a stateless person and/or refugee, and understood the concerns, as expressed by the delegation of the United Republic of Tanzania, of States receiving a large influx of refugees. Given the vast numbers of refugees existing in the world, it was obvious that legal arrangements were needed for their protection, but because the political circumstances varied, special arrangements were required in each case. The problem could not be solved by general and residual rules and could be more appropriately addressed by other bodies.

84. His delegation doubted that the topic of unilateral acts of States was ripe for codification given the lack of sufficient State practice. Very few unilateral promises made by States were intended to be legally binding.

85. Although Japan supported the Commission's efforts to produce guidelines on reservations to treaties, his delegation feared that the draft articles as they stood might be too complex to be useful as a guide to State practice. Conceptual distinctions among categories were meaningful only if the legal effects of each category were clarified. His delegation hoped the Commission would take up more concrete issues, such as the inadmissibility of reservations and objections to reservations. It did not feel that the subjects of draft guidelines 1.7.1, alternatives to reservations, and 1.7.2, alternatives to interpretative declarations, should be dealt with under the subject of reservations to treaties.

86. Japan would like to commend the Commission on its steady progress on the draft articles on international liability for injurious consequences arising out of acts not prohibited by international law. Such international liability could relate to many fields in international law, such as the marine environment, oil pollution, nuclear damage, natural resources, transportation, military activities and space. For some of those areas, a specific regime of liability had already been established. Since each of the various categories required consideration of its special characteristics, it would be difficult to establish a general principle applicable to all fields. Japan therefore strongly supported the Commission's focus on prevention and its decision to defer consideration of international liability. His delegation agreed with the approach of the draft articles in establishing certain procedural requirements, such as prior authorization, notification of and consultation with affected States, the provision of information to the public, and assessments of environmental impacts of activities involving a risk of significant transboundary harm.

87. At the current juncture, it was important to consider the final form the draft articles might take. If the text were to be adopted as a treaty, some States might be discouraged from signing it owing to difficulties in their domestic ratification process. It would therefore be preferable to adopt the draft articles as a guideline or resolution establishing a standard set of procedural requirements. Although the Commission was considering a framework convention as a possible form for the text, his delegation was not clear as to what was envisaged by a framework convention and would ask the Commission to re-examine the question of the final form of the draft articles taking into account the comments of Governments.

88. In considering topics for the long-term programme of work, his delegation hoped that the Commission would keep environmental issues under consideration. Because environmental law was a vast field where progressive development was rapidly taking place, the scope of work should be limited to international environmental law relating to the common heritage of mankind. The method of work should be to compile the common substantive provisions found in multilateral environmental conventions and extract general rules.

The meeting rose at 12.30 p.m.